IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

No. 76-343

Guy Hamilton Jones, Sr. ..... *Petitioner*

V.

United States of America, et al ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDICES

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TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
AND APPENDICES

The petitioner Guy Hamilton Jones, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding June 9, 1976.

OPINION BELOW

The opinion of the Court of Appeals, reported as _____F 2d_____, appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Arkansas is reported as 401 F. Supp. 168 (E.D. Ark. 1975) and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of appeals for the Eighth Circuit was rendered on June 7, 1976. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether a civil remedy is available under the Federal Tort Claims Act for damages arising from jury tampering by Federal agents which resulted in a mistrial in a criminal prosecution.

2. Whether invidious discrimination is a necessary element of the civil remedy created by 42 U.S.C. §1985 (2) for damages arising from jury tampering by Federal agents which resulted in a mistrial in a criminal prosecution.

3. Whether violation of a Constitutionally protected right by Federal agents acting under color of their authority gives rise to a cause of action pursuant to the Bivins Doctrine as announced by this Court.

STATEMENT OF THE CASE

Petitioner filed suit in United States District Court against the United States Attorney for the Eastern District of Arkansas, his assistants, agents of the Department of Justice, and agents of the Internal Revenue Service of the Department of the Treasury. Petitioner sought damages he alleged resulted from a mistrial declared *sua sponte* by the trial court. This mistrial was a direct result of jury tampering by Government agents at the instigation of Government attorneys.

Petitioner alleged Government agents had contacted a juror and placed the juror under visual and electronic surveillance with the active participation by the juror. A companion case was removed from State Court which named the same defendants except for the United States of America.

To best understand the sequence of events which led to the aborted criminal proceeding in which Petitioner was defendant, a transcript of two successive *in camera* hearings by the trial court is presented in full. At the first hearing, held in the morning hours, the trial court advised the defense that an attempt had been made to contact juror Taylor but that he saw no reason to grant a mistrial if one should be requested. None was requested. That afternoon, a second *in camera* hearing was held at the request of Government attorneys who, along with the United States Marshal, made partial disclosure to the Court of contacts made by Government

agents with juror Taylor. Upon being advised by the Government that juror Taylor had been placed under visual and electronic surveillance by Government agents the Court determined that juror Taylor had been contaminated by the conduct of Government agents and declared a mistrial, *sua sponte*.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V. CASE NO. LR-72-CR-8

GUY HAMILTON JONES, SR.,
Defendant.

CONFERENCE IN CHAMBERS
PRECEDING DECLARATION OF MISTRIAL
July 18, 1972

Present during the conference were United States District Judge J. Smith Henley; Mr. W. H. Dillahunty, United States Attorney; Mr. James Mixon and Mr. Robert Fussell, Assistant United States Attorneys; Mr. Leon B. Catlett, Attorney for the defendant, and the defendant, Mr. Guy Hamilton Jones, Sr.; and Mr. Lynn Davis, United States Marshal.

(At 12:00 Noon on Tuesday, July 18, 1972, the following proceedings were had in chambers:)

THE COURT: Gentlemen, on the record. I want to make a report to you that I am not sure I ought to make, or I am required to make, but, in order to give you the advantage of the information the Court has about what might be a jury problem, I think I better tell you now and then you can do as you please. I hope you do nothing, but then that is up to you.

Late last week—I guess it was on Friday, either late Thursday or on Friday—it was reported to me that one of our male jurors had had a visitor to his home calling in the interest of Mr. Jones in this case. The juror was not home. The visitor was advised by the juror's wife that it wouldn't be a good idea, or it might not be a good idea for the subject to be discussed with the juror, and so the visitor left. I learned the visitor's name, but I don't now recall it.

The next day, sometime during the day, as I recall, the visitor had occasion to see the juror and said, in substance, to him, "I'm sure glad I didn't see you last night. I might have made a mistake." Or something along this line.

Now, that ended the conversation, as far as I know. There has been nothing else occurred. I think that is substantially it. Anyway, the juror reported, as I have instructed jurors to do if anybody undertakes to talk to them about the case, either report it to the marshal or one of his deputies, and the marshal will, in turn, report it to me. There may be a little bit more to it than that, but that is the substance of it.

On Monday morning, one of the lady jurors reported to the marshal that she might not have told me the entire truth on voir dire and she was disturbed about it. So, I spoke to her before the session began on Monday and learned that she had visited her mother—that is, the juror had visited her mother over the weekend, on Sunday—at Almyra, which was the childhood home of Mrs. Jones. The juror learned from visiting with her mother that some of Mrs. Jones' relatives knew her mother and, indeed, she knew some of them. The juror was concerned because on voir dire she responded that she didn't have any

association with these people, or any association with anybody on either side. There was no discussion about the merits of the case, as far as I know. I don't think this episode has any significance, but, since I have reported the one I thought I would report the other. The juror assured me that there wasn't anything about this information that would affect the trial one way or the other, and I think she is telling the truth. In fact, I think the lady was simply concerned that she might not have told me the truth on voir dire and she wanted to set the record straight.

Now, Mr. Davis, so far as the report from the male juror is concerned, have I left out anything of substance?

MR. DAVIS: No, sir, except that it has been brought to my attention that one of the jurors has made statements in the presence of other jurors back in the jurors' room concerning—well, such as was reported to me, quote, "You can't believe a damn thing those Revenue men tell you. They would lie just as well as tell the truth."

THE COURT: Was this one juror speaking to the other jurors?

MR. DAVIS: Yes, sir.

THE COURT: All right. Of course, I prefer that they not discuss the case at all, but then they will do that. I was referring to the particular episode about the night visitor to the home of the juror. Have I left out anything?

MR. DAVIS: No, sir. That pretty well covers it.

THE COURT: Now, gentlemen, I tell you these things not because I think that there is any ground for a

mistrial, but because it is possible that, because it is your choice to make and not mine, one or the other side may wish for a mistrial. I don't expect you to do anything at the moment. If you want to think about it, that's all right, but I thought you ought to know.

MR. CATLETT: Judge, I am disturbed about it, of course, because whoever the fellow was, or whatever he did, which doesn't appear to be anything, but still it might have prejudiced that juror, whoever he is.

THE COURT: Well, I think I probably ought to go ahead and tell you the names of these two jurors, if I can recall them. The lady juror, I believe, is the No. 2 juror. I don't have my chart in front of me, but she is the No. 2 juror. The seating chart will show her name. The male juror's name is Taylor.

I want to make sure you understand this. By no means should counsel or their clients or associates make any mention of what I have said here to you in chambers to a juror here in the course of this trial because that would be disastrous. I would have to declare a mistrial on motion for such mistrial. I would hate to have to do that because we have too much time invested in this trial.

At any rate, as I said at the beginning, I don't think there is anything here that warrants a mistrial, but I thought I ought to report it to you because, in the last analysis, it is up to counsel to move for mistrial if one is needed, or seek some other corrective action. I shouldn't bear that responsibility alone.

MR. CATLETT: Of course, you know I don't want to go through another trial.

THE COURT: As I said, I am not requiring you to do anything at the moment. I just wanted to inform you.

MR. CATLETT: I would like to talk to Mutt about it.

THE COURT: Very well. I'm not putting any muzzle on you.

MR. CATLETT: I don't want to talk to anybody else.

THE COURT: Certainly, you shouldn't talk to a juror about it.

MR. CATLETT: Of course, not.

THE COURT: Now, gentlemen, I have told you all I know, and I imagine it is time to recess for lunch. If you decide you want to make any kind of motion, on either side, you know how to do it. I don't expect any answer immediately but, by the time the day is over, you ought to do anything you are going to do before we close up today.

MR. MIXON: I was wondering if it was possible if we could wait until after Mr. Jones' testimony to say what we might want to do, if anything.

THE COURT: Well, at the close of business today, we will have a session and that will give you time to think about it.

(THEREUPON, at 12:10 o'clock p.m., a recess was taken until 2:00 o'clock p.m., at which time the trial resumed in open court. At 2:15 o'clock p.m., the Court,

counsel for the parties and the defendant retired to chambers, where the following proceedings occurred:)

THE COURT: Gentlemen for the Government, what is the purpose of this request for a recess?

MR. DILLAHUNTY: Your Honor, I am not actively engaged in the trial of this case, but, of course, I am charged with the responsibility in any cases the Government has.

THE COURT: You are the United States Attorney.

MR. DILLAHUNTY: Yes, sir. I think it is only fair to say, Your Honor, that at an earlier session you pointed out about the juror, Mr. Taylor, having made a comment to the marshal about someone approaching him, and I think I need to add something to that for the record.

On last Friday, when the marshal was contacted by this juror, this was brought to our attention and we were told by the marshal that Mr. Taylor had informed him, the marshal, that his wife had been approached and that Mr. Overton had wanted to talk to Mr. Taylor about the Mutt Jones case. After this information was received, we informed the Chief of the Intelligence Division, Mr. Russell James, and we asked him to investigate this case as a possible jury tampering case. Mr. James, along with other agents from the Internal Revenue Service, with the complete cooperation of Juror Taylor, undertook surveillance of Mr. Taylor's house in order to witness any possible contacts or future contacts with Mr. Taylor about this trial. This surveillance has been conducted as late as this morning. It has produced negative results. Mr. Taylor gave the information about Mr. Overton as being the

person who contacted his wife and said that Mr. Overton was the chief pilot for Jack Stephens, that Mr. Overton indicated to Mr. Taylor's wife that he was reluctantly seeking to approach Taylor and that he had been requested to do so by Mr. Skeeter Dickey. Mr. Skeeter Dickey is known to Mr. Taylor to be a very close associate of Jack Stephens, and I am informed that—and I do not have the papers to show that--but I am informed that Jack Stephens is president of the Little Rock Airmotive, where this man works.

I think it is only fair to bring it all out and say that this juror has cooperated with us in an effort to try to find out what this deal was. And I think, since the Government has the burden of not only seeing that a trial is fair, but to make sure that it even appears to be fair, that we need to advise the other side of this.

THE COURT: Let me see if I understand, Mr. Dillahunty. Either on or after Friday of last week, as the Court understands it, agents of the Government have discussed this matter, or the matter of surveillance, with Mr. Taylor?

MR. DILLAHUNTY: Yes, sir, to the extent that he permitted his house to be under surveillance and permitted his house to have a recorder in an effort to try to obtain information if he was contacted again. But, as I pointed out, the result was negative. He talked with the United States Marshal.

THE COURT: We will have to take one case at a time. What does this do, the effect of this conference, if I may call it that, with Mr. Taylor? What does that do to the effectiveness of this particular jury in the Jones case?

MR. DILLAHUNTY: Your Honor, I could, of course, not answer that question. I have not talked to Mr. Taylor and I don't think either of the assistants who have conducted this trial certainly have not talked to him. Of course, if I were going to try to guess, I think it could go either way. The man may have resented it. It may have amounted to nothing. No other attempt has been made to contact him, but at least counsel for the defendant is entitled to know that this did occur, and it was brought to my attention by Mr. Mixon and Mr. Fussell, and we discussed it at length and thought it necessary to advise the Court and the other side of this.

THE COURT: What position is the Government in in contacting a juror during the course of a prosecution? I can understand putting a watch on his house to see if anybody else showed up, but I have some problem about advising the juror that it is going to be done. It gives me a little trouble. I'm talking about as it affects this particular jury. What do you think, Mr. Catlett?

MR. CATLETT: Well, Judge, I think my reaction is that the juror would probably vote against us. I sure hate to go through another long trial. All of us do, of course. It's been a long trial, and it is an expensive trial. Could the Court—I'm just asking now—could the Court excuse him and use the alternate juror? Would that be possible or would that—

MR. DILLAHUNTY: Your Honor, I—

THE COURT: Just a minute. I'm afraid that—you see, I don't have any way of knowing, without completely messing up the possibility of having an unbiased jury, I don't really know what communications there may have

been between Mr. Taylor and his fellow jurors on this subject

MR. DILLAHUNTY: Of course, I have no way of knowing that either, Your Honor. I might say this, too, Your Honor. Something else comes to my mind, at least an innuendo, if you can call it that, and that is what is left with Mr. Taylor with reference to his job? That might possibly be involved. My understanding is that his reaction to that was that his job wasn't worth it, or some reference to that effect. Of course, it's a sad thing that these things occur.

MR. CATLETT: Well, I would say definitely that Taylor would not—I would think he wouldn't vote for us regardless of the evidence, under these circumstances. I don't know. Guy, what do you think?

THE DEFENDANT: I don't know what to think. I am sitting here where I can't be objective. I never heard of Taylor. I don't know Overton. I really don't know what to think. This is all new to me.

MR. DILLAHUNTY: Of course, it's all new to us, too, Mr. Jones.

THE DEFENDANT: It's totally new to me.

THE COURT: You understand, I'm not trying to draw any inferences at the moment beyond the four corners of this particular case we are trying. I want to try one at a time. I would like to get to try one, and then reach another one if, as and when we have it. Gentlemen, I am really afraid to do anything other than mistrial this case. I hate to do it. We have got seven hard days put into it, in

the trial. I am afraid that with the contacts that have been made that Taylor, regardless of what his reaction is, could not view this evidence objectively. I'm afraid that he would have a tendency to lean over backwards one way or the other, and you can think around the circle and you still don't know where he would fall. But, his having been approached and had this matter discussed with him, and then his having participated,. passively of course, in a surveillance, I'm afraid it has put him in the position where he would either feel obligated to lean over backwards one way or the other in order to show he is impartial, and this, of course, I don't want him to do. I want him to decide the case according to the law and the evidence. Now, I don't know whether he would turn out to vote for conviction or against, but I'm afraid that we simply cannot have any confidence in his verdict, or that of the jury. I'm just afraid of it.

Now, let's go off the record for a moment.

(THEREUPON, there was a discussion off the record among the parties, after which the Court and counsel for the parties and the defendant returned to the courtroom.)

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Respondents filed a motion to dismiss Petitioner's suit in District Court. This motion was later amended and Respondents sought summary judgment. Affidavits to the motion for summary judgment made more detailed disclosure of Government activities in contaminating the juror. These revealed that electronic devices were placed on the juror's person.

On July 17, 1975, Respondents presented their motions to the Honorable Warren K. Urbom, District Judge on exchange, urging dismissal for want of jurisdiction and in the alternative seeking summary judgment.

Petitioner urged three reasons for District Court jurisdiction: (1) the Federal Tort Claims Act; (2) provisions of 42 U.S.C. §1985 (2) before the semicolon; (3) the Federal common law remedy created by this Court in *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

On August 28, 1975, the District Court made and entered an order dismissing Petitioner's complaint for failure to state a claim upon which relief may be granted. A similar order was entered dismissing the case removed from State Court. 401 F. Supp. 168.

In his memorandum opinion, the District Judge rejected Petitioner's argument which urged application of the Federal Tort Claims Act. Petitioner had argued that an early decision of the Supreme Court of Arkansas permitted civil recovery of damages arising from conduct that was criminal as well as for conduct that was negligent. *Bizzell v. Booker*, 16 Ark. 308.

The District Judge also rejected Petitioner's argument that 42 U.S.C. §1985 (2) before the semicolon permitted civil recovery of damages from interference with rights of a litigant in a Court of the United States,

notwithstanding the lack of allegations of invidious discrimination. The District Judge held that invidious discrimination was a necessary element of the remedy.

A third argument for District Court jurisdiction was likewise rejected by the District Judge. Petitioner had urged application of the Bivins Doctrine in an effort to penetrate the threshhold of District Court. The District Judge refused application of the Bivens Doctrine beyond Fourth Amendment rights.

Petitioner timely filed his appeal to the United States Court of Appeals for the Eighth Circuit. On June 9, 1976, the Eighth Circuit affirmed the District Court and further barred Petitioner from the threshhold of the District Court by granting a "good faith" defense to the non-lawyer defendants and absolute immunity to the prosecutors. Guy Hamilton Jones, Sr. v. United States of America, et al,_____.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE CLEAR MANDATE OF THE SUPREME COURT OF ARKANSAS WHICH PERMITS CIVIL RECOVERY FOR DAMAGES ARISING FROM CRIMINAL AS WELL AS NEGLIGENT CONDUCT.

The Supreme Court of Arkansas, the Court of last resort of the State, declared in 1855 that litigants would be permitted to recover civil damages arising from

criminal wrong doing. *Bizzell v. Booker*, 16 Ark. 308. Both in the District Court and in the Eighth Circuit, Petitioner urged the doctrine pronounced in *Bizzell* was a clear statement of the common law of Arkansas. The courts below dismissed *Bizzell* as dictum and denied Petitioner's effort to penetrate the threshhold of the District Court by way of the Federal Tort Claims Act.

The District Court and the Eighth Circuit should have remanded the case originating in the State Court for the purpose of permitting the State Courts of Arkansas to remove any misunderstanding about what is or is not the common law of Arkansas. Petitioner urged the courts below to utilize the abstention doctrine and defer to the Supreme Court of Arkansas to determine the thrust of *Bizzell*. Petitioner urged that the Supreme Court of Arkansas is the final expositor of the common law of Arkansas. *England v. Louisiana State Bd. of Medical Examiners*, 84 S. Ct. 461, 375 U.S. 411, 11 L. Ed. 2d 440.

Questions involving the vital nature of the common law of a state should best rest with the highest court of that state and not within the bosom of the Federal judiciary. The Supreme Court of Arkansas could, and Petitioner feels strongly that it would, clarify the meaning of *Bizzell* once and for all, and restate the clear pronouncement contained in *Bizzell* that a civil remedy is available to redress damages arising from all criminal conduct.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. §1985 (2) BEFORE THE SEMICOLON.

Petitioner candidly admitted in the Courts below that he is white, a Protestant, a vocal and somewhat colorful Democrat. None of these qualified him for benefits of the post Civil War civil rights legislation. He urged below that a classless citizen need not allege or prove invidious discrimination in order to obtain relief under 42 U.S.C. §1985 (2) before the semicolon. As a victim of a jury tampering scheme by Government agents he argued he should be permitted to penetrate the threshhold of the District Court under the remedy provided by §1985 (2) before the semicolon to recover damages he suffered by reason of jury tampering by Government agents in a court of the United States.

Both sides below admitted to a dearth of decisional guidelines on this question. *Hahn v. Sargent, infra.* Petitioner relied below principally upon *Kelly v. Foreman et al*, 384 F. Supp. 1352 (1974), in which a United States District Court divided §1985 (2) into two parts, that which precedes and that which follows the semicolon. Kelly was permitted to penetrate the District Court threshhold without alleging invidious discrimination.

The Fifth Circuit is contrary to the Eighth Circuit decision herein. *Seeley v. Brotherhood of Painters,*

Decorators, Etc., 308 F. 2d, 52 (1962). The Fifth Circuit would have permitted Seeley to penetrate the threshhold of the District Court had the conduct there complained of involved a court of the United States. The conduct complained of there involved litigation in a state court of Alabama and the National Labor Relations Board, neither of which was a court of the United States as required by §1985 (2).

The First Circuit likewise would have permitted penetration of the District Court threshhold in *Hahn v. Sargent*, 523 F. 2d 461 (1975) had there been allegations of injury stemming from a conspiracy to interfere with Federal Court proceedings.

An irrevocable conflict exists between the Eighth, the Fifth and the First Circuits on interpretation of 42 U.S.C. §1985 (2) before the semicolon.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SCOPE OF THE REMEDY CREATED BY THE BIVINS DOCTRINE PROMULGATED BY THIS COURT.

Is the doctrine announced by this Court in *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971) limited to civil recovery for damages arising from violations by Government agents of Fourth Amendment

Rights? Or, does the doctrine extend to all Constitutionally protected rights?

The decisions of various Circuit Courts of Appeals leave the answer to these questions uncertain if not in hopeless conflict.

The Third Circuit extended *Bivins* to Fifth Amendment rights. *United States ex rel Moore v. Koelzer*, 457 F.2d 892 (1972); *Bethea v. Reid*, 445 F.2d 1163 (1971). The Third Circuit also extended the *Bivins* rationale in a case involving a state officer's violation of an Eighth Amendment right. *Howell v. Cataldi*, 464 F.2d 272 (1972). The Fourth Circuit applied the *Bivins* rationale to violation of Fifth Amendment rights by custom officers. *State Marine Lines, Inc., v. Shultz*, 498 F.2d 1146 (1974).

It would appear that the lower Federal judiciary is more concerned with closing the door pried open by this Court in *Bivins* than with careful application of the principles there announced in an appropriate case. This is an appropriate case.

An irrevocable conflict exists between the Eighth Circuit, the Third Circuit and the Fourth Circuit as to the scope of the *Bivins Doctrine*.

4. THE DECISION BELOW GRANTING ABSOLUTE IMMUNITY TO PROSECUTORS ACTING OUTSIDE THEIR ROLE AS ADVOCATES AND ABSOLUTE IMMUNITY

TO GOVERNMENT AGENTS ACTING AS INVESTIGATORS IS IN CLEAR AND IRREVOCABLE CONFLICT WITH THE DECISION OF THIS COURT IN *IMBLER V. PACHTMAN.*

The Eighth Circuit decision sought here to be reviewed charted a collision course with the decision of this Court in *Imbler v. Pachtman*,____U.S.____, 47 L.Ed.2d 128,____S.Ct.____. There this Court said in its closing statement.

> * * *"We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983."* * *

Investigating an attempt by a stranger to the on-going criminal proceedings to contact a juror is plainly an administrative or investigative role. At no time in regard to contacts with juror Taylor was the United States attorney, or his assistants, cast in the role of an advocate.

In no event does qualified immunity reach out and blanket the United States Marshal, the named and

unnamed agents of the Internal Revenue Service and the Department of Justice whose conduct was clearly illegal. (See this Court's Docket No. 75-273)

It is clear that the Eighth Circuit misinterpreted an essential fact in this case. It was not the attempt by a stranger to the on-going criminal proceedings to contact juror Taylor which resulted in the mistrial. It was the involvement of the United States attorney, his assistants and the named and unnamed Government agents in carrying on a visual and electronic surveillance of the juror with the juror's knowledge and active participation which caused the Court to declare, *sua sponte*, a mistrial.

Characterizing criminal conduct as good faith does not comport with essential qualities of justice. Misguided or overzealous officialdom may always think they act in good faith when undertaking a course of conduct that is manifestly illegal. See this Court's Docket No. 75-273. Such characterization could well have excused the Watergate caper and the burglary of Ellsburg medical files.

CONCLUSION

For the reasons herein urged, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1812 Guy Hamilton Jones, Sr., Appellant, V. United States of America, et al., Appellees. No. 75-1813 Guy Hamilton Jones, Sr., Appellant, V. W. H. Dillahunty, et al., Appellees.	Appeals from the United States District Court for the Eastern District of Arkansas

Submitted: May 11, 1976

Filed: June 9, 1976

Before BRIGHT, STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal concerns the district court's [1] dismissal of consolidated civil actions for damages brought by appellant Jones against the United States, members of the United States Attorney's office, a United States Marshal, and various other federal officials alleging a deprivation of his constitutional rights based upon allegations of illegal jury tampering in connection with his aborted criminal trial on charges of tax evasion and perjury. *Jones v. United States*, 401 F. Supp. 168 (E.D.Ark. 1975). Appellant asserts error in the district court's findings that no claim upon which relief could be granted was stated under the Federal Tort Claims Act (28 U.S.C. §1346(b)), 42 U.S.C. §1985(2), or the damage rationale expressed in *Bivins v. Six Unknown Named Agents*, 403 U.S. 388 (1970). We affirm the district court's dismissal.

The facts reveal that on July 14, 1972, during the course of appellant Jones' trial on criminal tax charges, the court and various federal officials including members of the United States Attorney's office, were apprised that an attempt had been made to contact a juror on Jones' behalf. Acting on this information, two Assistant United States Attorneys consulted with the Department of Justice and the Intelligence Division of the IRS. The use of electronic monitoring and recording devices in an attempt to gain information and evidence in this matter was approved by the Attorney General and consented to

1. The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska, sitting by designation.

by the juror who had been the subject of the contact. The use of this equipment began immediately.

On Tuesday, July 18, 1972, the district court brought the fact of the attempted contact to the attention of all parties. Later that same day, the United States Attorney requested a conference in chambers at which time he revealed the existence of the electronic surveillance with the juror's consent. Upon hearing this information, the district court declared a mistrial.

Subsequently, appellant Jones brought suit in federal court against the United States under the Federal Tort Claims Act and against the individual federal defendants under 42 U.S.C. §§ 1981, 1983, and 1985. A similar suit was brought in state court against the individual defendants only. Each of these actions for damages was based upon the contention that the surveillance activities brought about by the defendants' acts resulted in a mistrial and the denial of the right to a speedy trial to Jones. The state action was removed to the federal court and considered with the pending federal action. A motion to dismiss or in the alternative for summary judgment was filed by the defendant in response to the complaint. The motion was accompanied by a brief in support of the motion and lengthy affidavits from the defendants and from the persons involved in the alleged jury tampering incident. Appellant Jones contested the motion but did not file any supplementary affidavits. The memorandum and order dismissing these suits for failure to state a claim upon which relief could

be granted was filed by the district court on July 9, 1975. [2]

Appellant initially contends that the district court erred in dismissing his claim for damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b). As a basis for this contention, appellant Jones asserts that Arkansas law affords a civil damage action for violations of the criminal jury tampering statute. We disagree.

The decision of the Arkansas Supreme Court in *Bizzell v. Booker*, 16 Ark. 308 (1855), does not create the civil damage remedy urged by appellant. At most, *Bizzell* can be read as providing some dictum in support of the general principle that many criminal wrongs have a corresponding civil remedy. This maxim has not been generally extended to the type of wrong alleged herein. *Cf. Ragsdale v. Watson*, 201 F.Supp. 495, 502-03 (W.D. Ark. 1962); *Robinson v. Missouri Pacific Transportation Co.*, 85 F.Supp. 235, 238-39 (W.D.Ark. 1949). In addition, there is no evidence to suggest any legislative intent to create a civil remedy in such instances under the Arkansas statutory scheme. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). The portion of the complaint based

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2.
The claimed civil rights deprivations under sections other than section 1985(2) were either dismissed or abandoned prior to the dismissal by the district court which is presently before this court on appeal. *Jones v. United States*, *supra*, 401 F.Supp. at 170.

upon the Federal Tort Claims Act was properly dismissed. [3]

Appellant next argues that the dismissal of his claim brought under 42 U.S.C. §1985(2) on the ground that he failed "to allege a racial or class-based animus" was improper. *Jones v. United Sates, supra*, 401 F.Supp. at 173. The district court in its opinion carefully analyzed the legislative history of section 1985 and the Civil Rights Acts in general and concluded that the racial or class-based discrimination rationale expressed by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971), applies equally to all clauses of that statute. 401 F.Supp. at 174. *See Kerckhoff v. Kerckhoff*, 369 F.Supp. 1165 (E.D.Mo. 1974); *Johnston v. National Broadcasting Co.*, 356 F.Supp. 904, 909 (E.D.N.Y. 1973); *Kitchen v. Crawford*, 326 F.Supp. 1255 (N.D. Ga. 1970), *aff'd*, 442 F.2d 1345 (5th Cir. 1971). *Cf. Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). *But see Kelly v. Foreman*, 384 F.Supp. 1352 (S.D.Tex. 1974). We affirm that holding.

Finally, appellant urges that he has stated a proper cause of action under the doctrine of *Bivins v. Six Unknown Named Agents*, 403 U.S. 388 (1970). The district court refused to grant jurisdiction in this action based upon *Bivins*, 401 F.Supp. at 174. We do not reach

3.
Appellees urge that the claim against the United States is further barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a). We find it unnecessary to reach this issue.

this substantive issue regarding the jurisdictional limitations of the *Bivins* decision. The factual record in the instant case indicates that the federal officers and employees involved herein were acting in good faith based upon reasonable grounds and within the scope of their investigative authority. Thus, they are shielded from this damage action by the doctrine of qualified immunity. [4] *See Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Apton v. Wilson*, 506 F.2d 83, 90-95 (D.C.Cir. 1974); *Burkhart v. Saxbe*, 397 F.Supp. 499, 502-03 (E.D. Pa. 1975). *See also Wood v. Strickland*, 420 U.S. 308, 313-22 (1975). *Cf. Imbler v. Pachtman*, 96 S.Ct. 984, 990-96 (1976); *Wilhelm v. Turner*, 431 F.2d 177, 180-83 (8th Cir. 1970).

In *Apton v. Wilson, supra*, the District of Columbia Court of Appeals addressed the issue of qualified immunity for Justice Department officials and employees who directed and participated in the arrest of demonstrators in violation of their constitutional rights. The court, after careful examination of the legal precedent, concluded that

> a qualified immunity, having the same general character as that contemplated by the Supreme

4.
The immunity issue was not addressed by the district court. However, the doctrine of immunity was raised by the appellees in their brief in support of the motion to dismiss or for summary judgment. The judgment of the district court may be affirmed on "any ground consistent with the record, even if rejected or ignored in the lower court." *Tiedman v. Chicago, Milwaukee, St. Paul and Pacific RR*, 513 F.2d 1267, 1272 (8th Cir. 1975).

> Court in *Scheuer* [*v. Rhodes*], is available to the Justice Department of defendants in the present action. Such an immunity appropriately allows vindication of the Fourth and Fifth Amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power.

506 F.2d at 92-93. Similarly, we find that the federal employees and officials in the instant case are entitled to assert this same qualified immunity as a defense for their actions taken in response to the information that a juror in an ongoing criminal case had been wrongfully contacted on the defendant's behalf.

In addition we find that a remand for further factual development of the record is unnecessary here. Unlike the *Scheuer* and *Apton* cases, the extensive and uncontroverted affidavits submitted by the federal defendants to the district court in connection with their motion for dismissal or a summary judgment amply demonstrate requisite konwledge and good faith belief that they were acting lawfully to support a finding of qualified immunity. *See Scheuer v. Rhodes, supra,* 416 U.S. at 1693; *Apton v. Wilson, supra,* 506 F.2d at 94-95. Those affidavits reveal that the federal officials involved had reliable information that a contact with a juror had been attempted. In response to that information, the officials instigated an investigation in the belief that since a mistrial was mandated by the very fact of that attempt, no additional prejudice could accrue to the

defendant by pursuing such investigation. 5 Appellees acted within the scope of their authority with good faith and a reasonable belief that their conduct was lawful. Thus, they are entitled to the protection of the qualified immunity doctrine.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

5.
We note that these individuals were primarily acting in an investigative role and thus were not necessarily subject to the doctrine of absolute immunity that cloaks a prosecutor's actions taken within "the judicial phase of the criminal process." *Imbler v. Pachtman, supra,* 96 S.Ct. at 995 & n.33. *See Wilhelm v. Turner, supra,* 431 F.2d at 180-83.

APPENDIX B

ORDER
LR-75-C-215

Pursuant to the memorandum filed this date in the case of *Jones v. United States of America and W. H. Dillahunty, et al*, LR-75-C-141,

IT HEREBY IS ORDERED that the action is dismissed for failure of the complaint to state a claim upon which relief can be granted.

Dated August 27, 1975.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

ORDER

LR-75-C-141

Pursuant to the accompanying memorandum,

IT HEREBY IS ORDERED that the defendants' motion to dismiss, filing at 34, and motion to dismiss or in the alternative for summary judgment, filing at 114, are granted and the action is dismissed for failure of the complaint to state a claim upon which relief may be granted.

Dated August 27, 1975.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

MEMORANDUM

This is an action against a United States Attorney and his assistants, agents of the Department of Justice, and agents of the Internal Revenue Service of the Department of the Treasury for damages for alleged jury tampering occurring at the plaintiff's aborted criminal trial. The claim is that during the criminal trial the defendants (who were prosecutors and others associating with the prosecutors in prosecuting the plaintiff) contacted or caused the contacting of a juror at and about his home, as a result of which a mistrial was declared, thereby depriving the plaintiff of the just and speedy trial guaranteed by the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Pursuant to this court's order of July 9, 1975, a hearing was held on July 17, 1975, to consider the defendants' motion to dismiss, filing at 34, and motion to dismiss or in the alternative for summary judgment, filing at 114. The hearing consisted of testimony and oral argument relative to the legal recognition of this action under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and the Civil Rights Act, 42 U.S.C. §1981 et seq. This court previously held that no claim under 42 U.S.C. §1983 has been stated by the plaintiff in his complaint as amended, and the plaintiff has admitted that no claim exists under 42 U.S.C. §§1981, 1982, 1984, 1985(1), 1985(3), and the last clause of 1985(2). Therefore, if a legal remedy exists to redress the allegations made by the plaintiff, it exists under the Federal Tort Claims Act or the initial clause of 42 U.S.C. §1985(2).

I. THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act, 28 U.S.C. §1346(b) declares:

> " . . . [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Emphasis added)

It is the italicized language which this court now addresses to determine whether a recognizable claim has been presented. The court must decide whether under the facts alleged the United States, if it were a private person, would be liable to the plaintiff under Arkansas law.

In his complaint the plaintiff alleges that the defendants participated "in contacting, associating with, and using electronical devices within and about the home of a juror impaneled . . . in the criminal trial of the plaintiff" and that "the Court, upon being informed of said relationship, acts, contacts and communications . . . promptly declared a mistrial, preventing plaintiff from obtaining a prompt determination of the matters at issue." The second count of the complaint alleges that the defendants "secretly conspired to and did tamper with a juror sitting on the trial of the plaintiff" and "did secretly, jointly and severally conspire to, and did obstruct justice in said trial by preventing a determination of said trial as

provided by law thereby depriving the Plaintiff of a speedy trial with an impartial jury." Using the allegations of this complaint the court must decide whether the law of Arkansas recognizes a cause of action for damages for alleged jury tampering and obstruction of justice.

The plaintiff argues that jury tampering is a criminal violation of both state and federal law (citing Ark. Stat. §41-2806 (1964 Repl.); 18 U.S.C. §1503). He then argues that the common law of Arkansas recognizes an action for damages resulting from any illegal act. The plaintiff cites *Bizzell v. Booker*, 16 Ark. 308 (1855) to support his contention that all damages resulting from illegal acts are actionable under the Arkansas common law. The *Bizzell* case was an action of "trespass on the case" wherein the plaintiff sought to recover fire damage to his goods allegedly caused by the defendants' "improper, careless, and negligent management of their camp-fire, fire-pans, and fire-arms." The case specifically dealt with the appropriateness of certain jury instructions and in considering those instructions the court cited *Vandenburg v. Trux*, 4 Denio 464, for the general rule that:

> " . . . when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act, in such a careless and improper manner, that injury to third persons may probably ensue, he is answerable in some form of action, for all the consequences which may directly and naturally result from his conduct; and, in many cases, he is answerable criminally, as well as civilly." 16 Ark. at 317.

Since the *Bizzell* court held that no illegal act had been performed by the defendants under the alleged facts and that no instruction was proper about liability for illegal acts, even assuming that such was the law in Arkansas, I

do not believe it can be cited for the broad proposition that any criminal act subjects the wrongdoer to civil liability. It is unquestionable that assault and battery can subject an individual to both criminal and civil liability. Likewise the destruction of property can result in criminal and civil penalties. But it is highly improbable that all forms of illegal activity, regulatory and criminal, can become a basis for civil liability, and the better course is to examine the applicable criminal statute to determine whether civil liability is encompassed therein.

In determining whether a private remedy is to be inferred from the enacting of a federal or state criminal statute, this court considers the factors delineated by the United States Supreme Court in *Cort v. Ash*, _____U.S._____(June 17, 1975):

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied;—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

The *Cort* case dealt with a federal statute and the suit before this court concerns an alleged violation of both state

and federal criminal law. Although in the context of the Federal Tort Claims Act the question is whether Arkansas courts would recognize a civil remedy from violation of a state or federal criminal statute, the criteria of the *Cort* decision are analytically helpful. In applying these standards, however, I am mindful that no common law action for damages for tortious jury tampering has been found by either this court or the counsel representing the parties in this action. This absence places the plaintiff initially in a tenuous position.

In addressing myself to these criteria I look first to *Smith v. United States*, 274 F. 351 (C.A. 8th Cir. 1921), wherein it was stated that the purpose of §135 of the Criminal Code (U.S. Comp. Stat. §10305—the predecessor of 18 U.S.C. §1503) "was not to charge witnesses with duty or liability, but to protect them and the administration of justice from corruptly threatening and intimidating acts by third persons." If the statute were directed to a class of people it would be a class comprising witnesses and jurors, a class to which the plaintiff in this action does not belong.

Secondly, this court has been unable to discern any indication of state or congressional intent to create a civil remedy through the passage of their respective criminal statutes against jury tampering. An argument against such an inference of intended civil redress is presented in *Robinson v. Missouri Pacific Transp. Co.*, 85 F. Supp. 235 (U.S.D.C. W.D. Ark. 1949), and *Ragsdale v. Watson*, 201 F. Supp. 495 (U.S.D.C. W.D. Ark. 1962), wherein it was held that there is no civil action for damages arising from subornation of false testimony. The criminal statutes on perjury and jury tampering are sufficiently analogous for this court to say that as of this date no civil action for jury tampering exists in the State of Arkansas. If any

legislative intent existed to provide such a remedy, it has not been found by counsel or me.

Thirdly, I do not believe that it is consistent with the underlying purpose of the jury tampering statutes to imply a civil remedy for their violation. The emotional or physical distress the plaintiff may have incurred as a result of his mistrial cannot arguably have been the subject to which the criminal statutes were directed. Additionally, any violation of his speedy trial rights could and may have been protected within the framework of a constitutional defense at his criminal trial. I do not think therefore, that the draftors of these criminal statutes intended to create a civil remedy for their violation. Furthermore, I am convinced that the criminal strictures set out in the statutes themselves are sufficient to ensure the protection of trial witnesses, jurors, and the fair administration of justice in our judicial system.

I conclude that no claim has been stated upon which relief can be granted under 28 U.S.C. §1346(b), and that portion of the complaint based on the Federal Tort Claims Act should be dismissed. See *Devlin Lumber and Supply Corporation v. United States*, 488 F.2d 88 (C.A. 4th Cir. 1973); *Jeffries v. United States*, 477 F.2d 52 (C.A. 9th Cir. 1973); and *Roberson v. United States*, 382 F.2d 714 (C.A. 9th Cir. 1967).

II. 42 U.S.C. §1985(2)

The plaintiff argues further that a claim upon which relief can be granted has been stated under 42 U.S.C. §1985(2). Specifically, the plaintiff directs this court's attention to *Kelly v. Foreman*, 384 F. Supp. 1352, 1355 (U.S.D.C. S.D. Tex. 1974), wherein it is stated:

> "It is logical to assume that Congress intended by the languge of §1985(2) before the semicolon to protect specific activities vital to the functioning of courts of the United States, without requiring any allegation or proof of invidious discrimination."

The defendants disagree, arguing that an allegation of racial or other class-based discrimination is a necessary element for asserting jurisdiction under §1985(2). Cited by the defendants is *Griffin v. Breckenridge*, 403 U.S. 88 (1971). There the court said:

> "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to §1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' Id. at 485. The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 101-102.

Since the *Griffin* decision dealt directly with §1985(3) and specifically with a clause of that section containing "equal-protection-of-the-laws" language, I must determine whether or not it is imperative under §1985(2), which has no such language, to allege a racial or class-based animus. In other words, does the rationale of *Griffin* pertain to the whole of 42 U.S.C. §1985 or only that portion of §1985 which contains the equal-protection-of-the-laws language. It is the opinion of this court that 42 U.S.C. §1985(2) requires as an element of its particular cause of action that racial or class-based animus described in *Griffin*.

The *Griffin* court looked to the plain meaning of the statute and to the legislative history of the act to determine whether class-based animus was a necessary element to a cause of action under §1985(3). It was noted that §1985(3) was enacted in 1871 by the Forty-Third Congress in an attempt to enforce the Fourteenth Amendment against the violent and continuing indignities being perpetrated by members of the Ku Klux Klan. Section 1985(3) was originally drafter as a criminal statute which provided:

> "That if two or more persons shall . . . conspire together to do any act in violation of the rights, privileges, or immunities of another person, which . . . would, under any law of the United States . . . constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties . . . shall be deemed guilty of a felony . . . ."
>
> Cong. Globe, 42d Cong., 1st Sess., App. 68-69 (1871)

There was considerable question in the minds of some of the representatives of the Forty-Second Congress with regard to whether or not Congress could constitutionally enact a bill which would allow the federal government to prosecute an individual for a common law crime. See the discussion of Representative Rainey at Cong. Globe, 42d Cong., 1st Sess., 396 (1871). Because of this constitutional concern the bill was amended and the enumeration of the specific offenses was deleted. The amendment was presented by Representative Cook and offered by the bill's sponsor, Representative Shellabarger. It allowed for civil remedies in the event of any violation, and is basically the forerunner of what is now 42 U.S.C. §1985. From a reading of the legislative history it is apparent that the legislative intent of the Cook-Shellabarger amendment, upon which the Supreme Court in *Griffin* relied, was a reference to the entirety of the act.

The following language was incorporated in the *Griffin* decision as stating the Congressional purpose behind the Cook-Shellabarger amendment:

> "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivions which shall attack the equality of rights of American citizens; that any violation of the rights, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section."
>
> Cong. Globe, 42d Cong., 1st Sess. at 478 (1871)

Representative Shellabarger, the author of the above quotation, was referring to the entire portion of what is now 42 U.S.C. §1985. He was not referring to any

particular portion of the statute or any particular clause of the amendment. If the *Griffin* court relied upon this language as an indication of Congressional intent to require racial or class-based animus as an element of a cause of action under 42 U.S.C. §1985(3), it must follow that such an element is necessary under *any* portion of 42 U.S.C. §1985. While an argument can be made that the draftors of §1985 did not intend that it be limited only to racial or class-motivated actions but rather encompassed a statute which would allow a civil remedy for any conspiracy which sought to deny to any citizen any constitutional right, (see the statements of Representative Cook at Cong. Globe, 42d Cong., 1st Sess. at 485 (1871)), the obligation of this court is to follow the dictates of the United States Supreme court, and its reasoning relies on Congressional language referring to the entirety of 42 U.S.C. §1985.

Furthermore, in *Means v. Wilson*, F.2d (C.A. 8th Cir. August 5, 1975), in an opinion dealing with voting rights under §1985(3), the court held that "a complaint under 42 U.S.C. §1985(3) must allege facts to show that intentional or invidious discrimination was the object of the conspiracy." As the voting rights clause under §1985(3) does not contain any equal-protection language, the obvious implication arises that racial or class-based discrimination is necessary under all of §1985(3).

Since the language and style of §1985(3) is similar to §1985(2), it is not a great step to conclude that if racial or class-based animus is necessary under all of §1985(3) it must be necessary under all of §1985(2). The following courts have so held: *Hahn v. Sargent*, 388 F. Supp. 445 (U.S.D.C. Mass. 1975); *Kerckhoff v. Kerckhoff*, 369 F.

Supp. 1165 (U.S.D.C. Mo. 1974); *Johnston v. National Broadcasting Co., Inc.*, 356 F. Supp. 904 (U.S.D.C. E.D. N.Y. 1973); *McIntosh v. Garofalo*, 367 F. Supp. 501 (U.S.D.C. W.D. Pa. 1973); *Phillips v. Singletary*, 350 F. Supp. 297 (U.S.D.C. So. Car. 1972); *Boulware v. Battaglia*, 327 F. Supp. 368 (U.S.D.C. Del. 1971); *Kitchen v. Crawford*, 326 F. Supp. 1255 (U.S.D.C. N.D. Ga. 1970), affirmed 442 F.2d 1345 (C.A. 5th Cir. 1971), cert. denied 404 U.S. 956 (1971). I therefore conclude that the rationale of the *Griffin* decision must be extended to include 42 U.S.C. §1985(2), and because the plaintiff's complaint contains no allegations of racial or class-based animus, it must be dismissed for failing to state a claim upon which relief can be granted.

III. THE BIVENS DOCTRINE

The plaintiff also seeks redress in this matter pursuant to the doctrine promulgated in *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1970). The *Bivens* case was a decision in line with the Supreme Court's prior determination in *Bell v. Hood*, 327 U.S. 678 (1945). I am not persuaded that the jurisdictional doctrines of these cases extends to the matters pleaded before this court. Initially, there is a substantial argument that the *Bivens* doctrine is to be applied in only Fourth Amendment cases. *Moore v. Schlesinger*, 384 F. Supp. 163 (U.S.D.C. Colo. 1974), citing *Bivens v. Six Unknown Agents*, 456 F.2d 1339 (C.A. 2nd Cir. 1972) (on remand from 403 U.S. 388); *Moro v. Telemundo Incorporado*, 387 F. Supp. 920, fn. 1 (U.S.D.C. P.R. 1974); *Davidson v. Kane*, 337 F. Supp. 922 (U.S.D.C. Va. 1972). Additionally, the *Bivens* decision was premised on the recognition that unless a federal common law right to seek monetary damages exists under 28 U.S.C. §1331 no remedy would be

available to the aggrieved parties. The only effective procedure to inhibit malicious officers from harassing and intimidating citizens was to allow a civil remedy for damages thus incurred. That is not, however, the situation in the suit now before this court. Any violation of the plaintiff's right to a speedy trial was adequately safeguarded by his constitutional defense to such deprivation. Furthermore, a federal judge's contempt power is more than adequate to deter any intentional jury tampering activity on the part of federal officials. Therefore, I find that the *Bivens* doctrine should not be extended to grant jurisdiction in an action for damages from a federal officer's alleged attempts to prevent an individual from receiving a just and speedy trial.

IV. CONSIDERATION OF LR-75-C-215

As a final consideration in this suit the court directs itself to the plaintiff's petition in the case of *Jones v. Dillahunty, et al*, LR-75-C-215 (U.S.D.C. E.D. Ark.). The complaint in that case is substantially identical to the complaint considered herein. Since I have found that no claim upon which relief can be granted has been stated in *Jones v. United States of America and W. H. Dillahunty, et al*, LR-75-C-141, a similar finding must be entered in *Jones v. Dillahunty, et al*, LR-75-C-215.

Dated August 27, 1975.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge